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Supreme Court of the United States

October Term, 1941

No. 745

THE SCHENECTADY UNION PUBLISHING COMPANY

Petitioner

vs.

MARTIN L. SWEENEY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Petition by The Schenectady Union Publishing Company for Rehearing and for Stay of Issuance of Mandate

MORRIS L. ERNST
WILLIAM A. ROBERTS
Solicitors for Petitioner

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Petition by The Schenectady Union Publishing Company for Rehearing and for Stay of Issuance of Mandate

Comes now the petitioner, the Schenectady Union Publishing Company, by Morris L. Ernst, its solicitor, and respectfully prays for a rehearing of this case and for a stay of issuance of the mandate of this Court. The judgment of this Court, handed down on April 13, 1942, reads as follows:

> "The judgment is affirmed by an equally divided court. Mr. Justice Jackson took no part in the consideration or decision of this case."

The Problem of the Evenly Divided Court

There can be no more unfortunate outcome to a litigation than the failure of the highest court of the land

to reach a decision by reason of the equal division of the Justices. Since the days of John Marshall [1] this Court has made every effort to avoid the failure of justice which a tie vote of the highest tribunal of the land portends.

In line with this salutary policy, this Court has not infrequently in cases of tie votes granted rehearing, restored the case to the docket, and postponed reargument for considerable periods of time until the bench was so constituted that a majority vote could be reasonably expected.[2] The administrative problem of the tie vote has, however, been increasing. During the past 40 years there were only 35 cases of even division and 21 of these occurred during the last decade. Rehearings were sought in 16 and granted in 10.[3] A detailed analysis as to the remaining six, as far as we have been able to study the implications of the denials, indicate special circumstances calling for the refusals to rehear.

This increase in tie votes is apparently the result of voluntary disqualifications, *i. e.*, disqualifications not prem-

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[1] See *Mayor v. Miln*, 8 Peters 120, 122, where Chief Justice MARSHALL said: "The practice of this Court is not (except in cases of absolute necessity) to deliver any judgment in cases where constitutional questions are involved, unless 4 judges concur in opinion, thus making the decision that of a majority of the whole court. In the present cases 4 judges do not concur in opinion as to the constitutional questions which have been argued. The Court therefore direct these cases to be argued at the next term, under the expectation that a larger number of the judges may then be present." See also same case, 9 Peters 85.

[2] See *e. g., Home Insurance Company* v. *New York*, 119 U. S. 129, 148, 122 U. S. 636, 134 U. S. 594, originally decided at the October term, 1886 and not finally reargued until May 18-19, 1890; *The Selma Rome & Dalton R. R. Co.* v. *U. S.*, 122 U. S. 636, 637, 139 U. S. 560 (petition granted March 28, 1887, reargument had on March 25-26, 1891); *U. S.* v. *Sischo*, 260 U. S. 699, 262 U. S. 165 (rehearing granted November 23, 1922, reargument had April 23, 1923).

[3] See Appendix A. These figures are exclusive of four cases decided very recently at this term of Court.

ised on any ground mentioned in Federal statute,[4] which have become more frequent because of the growing practice of appointment to the bench of active members of the Executive and Legislative departments. We assume that the disqualification of Justice JACKSON in the instant case was of this character.

Such a disqualification does not reflect a Justice's feeling that he will be unable to judge fairly. Fully conscious of his relation to the parties or the subject matter, whatever it may be, he can guard against favorable bias as well as against leaning over backwards. The real risk of prejudicial treatment inheres only in those cases where a judge does not recognize that his opinion is affected by matters aliunde, as where the subject matter of a case touches off something in his conscious or subconscious experience. Voluntary disqualification usually stems from a judge's apprehension that his participation will subject his *court* to adverse criticism. The administration of justice is not scarred by such a disqualification in the ordinary case. But where personal preference premised on an apprehension of unfavorable public reaction results as it does here in leaving indefinitely undecided important societal and common law issues, a new factor has entered the situation which may well tip the scales the other way.

It is respectfully urged that where a tie vote results from a voluntary disqualification, the wise administration of justice requires that before confessing itself unable to decide a case rightfully before it, especially one voluntarily taken on for decision by reason of its great importance, this Court request the self-disqualifying justice to sit. The making of such a request by the Court will dispel all doubt in the public mind and in acceding to it, the justice will not be subject to personal criticism on the ground of taste. Such a procedure can entail no evil

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[4] See *e. g.*, 28 U. S. C. A. §§ 24, 25, 216.

social consequences; at the same time it will where invoked avert the failure of judicial administration evidenced by a tie vote.[5] Moreover, such a course would accord with the basic rule of necessity recognized in Anglo-American jurisprudence which requires even a legally disqualified judge to sit if otherwise there will be a failure of justice.[6]

National Implications of the Instant Case

By granting certiorari this Court has recognized that there are "special and important reasons"[7] why it should resolve the issues presented by the instant case. An even division is particularly unfortunate in this particular case in view of the multiplicity of actions still pending and the controlling importance of New York law in the field of words. New York, for better or worse, is the fountain head of national information, opinion and culture.

It should be remembered that this case is but one of many brought by respondent against different newspapers on the basis of substantially the same publication. Respondent has commenced no less than 66 separate suits,

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[5] Legislative approaches to this problem have been explored in the past. Consideration has been given to the possibility of asking retired Supreme Court Justices to sit, but the Congressional history of the presently effective Retirement Act renders the propriety of such a course doubtful under existing law. See the debates on H.R. 2518—to provide for retirement of Justices of the Supreme Court, 70th Congress, 1st Session, 81st Congressional Record, Vol. 1, at page 1114. It has also been suggested in the past that a statute be passed providing that judges of other federal courts, the presiding judges of the Circuits for example, be available to sit on the bench of this Court in the event of a tie vote. This Court being a constitutional tribunal, however, the validity of such a statute would be open to question.

[6] *Cf. Evans* v. *Gore*, 253 U. S. 245, 247 (1920); *Tumey* v. *Ohio*, 273 U. S. 510, 522 (1927); *People* v. *Edmonds*, 15 Barb. 529 (N. Y. 1853).

[7] United States Supreme Court Rule 38.

24 of which are still pending.[8] It is likely that the interposition of this Court will be requested in some of these cases. The attorneys for defendants in many other Sweeney cases join in this petition for rehearing. Though the cases involve for the most part the law of states (and the District of Columbia) other than New York, the issues of policy urged here are implicit in all of them and the fundamental common law pattern is similar; a ruling by this Court would have great persuasive effect. A failure to rule will encourage further multiplicity of suits and the continued emergence of a crazy-quilt of conflicting rulings in the field of Federal constitutional law and the common law properly applicable to charges made against national legislators.

Although aside from the constitutional issues this case nominally presents questions of New York law only, these questions arise in a sphere in which the law of New York is of prime national importance. All four of the major press association news services are directed from and have their principal offices in New York.[9] Out of 265 feature and picture syndicates in the United States and Canada, 100 are located in New York and practically all of the syndicated columns issue out of New York.[10] New York is the headquarters of 8 principal newspaper chains.[11] In the book field, 141 publishing firms accounting for more than 70% of all the titles issued by the 263 publishers in this country who in 1941 published 5 books or more, are New York concerns.[12] Finally, all four of the national

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[8] See Exhibit B.

[9] Associated Press, United Press, Trans-Radio Press and International News Service. BROADCASTING—1942 Year Book.

[10] Editor & Publisher—The Fourth Estate, 1942 International Year Book.

[11] *Ibid.*

[12] The Publishers Weekly—Annual Summary Number, January 17, 1942.

radio networks operate from New York City. These networks together in 1941 accounted for 41% of the broadcast income of the entire nation and controlled well over half of all the stations in the country.[13]

If a given type of utterance is adjudged libelous *per se* in New York, it is automatically barred in large part from the rest of the country including jurisdictions where such material has been held not actionable. To take an actual example: the Circuit Court of Appeals for the Third Circuit has since the decision of the Circuit Court of Appeals for the Second Circuit herein unanimously held that petitioner's publication is not libelous *per se*.[14] Since, however, much of the material circulating in the Third Circuit emanates from New York and therefore must be prepared with the law of that state in mind, discussion of the attitudes of public officials toward political, racial and religious minorities will be strait-jacketed there despite the decision of the highest Federal court in that area.

Errors of the Court Below

Though the grounds of this Court's division have not been disclosed, the division may have stemmed from the question whether the challenged utterance was actionable as a libel *per se* under the law of the State of New York. The answer to this question apart from policy, interpretation and constitutional aspects, depends (a) on the existence of a public official rule in New York, and (b) on whether, in the absence of such a rule, the challenged publication meets the requirements of libel *per se* in the light of the independent "state of mind" rule.

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[13] The World Almanac for 1942, page 860; see also Report on Chain Broadcasting, Federal Communications Commission, Commission Order No. 37, Docket No. 5060, May, 1941.

[14] *Sweeney* v. *Philadelphia Record Co.* (three cases), decided February 25, 1942, dismissing complaints on motion.

1. In our main brief we have adduced a long line of Appellate Division cases establishing the existence of a public official rule in New York.[15] It is of great significance that the Court below failed to negate Judge CLARK's analysis in favor of the existence of the rule. Respondent has been unable to point to a single New York case holding that any imputation against a public official, which, like that in the instant case, charges less than corruption or gross incompetence in office, is libelous *per se* no matter how false and harmful to reputation it may be. Such imputations are actionable only on allegation of special damage,[16] which is not claimed here.

2. An attempt was made to distinguish the public official cases on the ground that they are merely instances of the defense of fair comment. Since all these cases came up on motions addressed to the pleadings,[17] they have nothing to do with fair comment which is a matter of affirmative defense. The falsity of the charges was admitted and there could be no doubt that they were harmful to reputation. The sole issue was libel or no libel and the courts held that with reference to public officials only imputations of corruption or gross incompetence were libelous *per se*. The doctrine of fair comment may excuse assertions in the nature of comment which are libelous *per se*; the doctrine has nothing to do with non-libelous words.

3. There is no Court of Appeals case dealing with public officials subsequent to the Appellate Division cases hereinbefore referred to, which in any way discredits them. It is expected that the case of *Hall* v. *Binghamton Press*

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[15] Pages 13-19.

[16] See main brief at page 4, note 3; page 15.

[17] See Pet. Rep. Br. on Cert.

Co.[18] decided by the New York Appellate Division, Third Department on March 4, 1942, in a three to two decision against a Congressman's claim of libel *per se*, will be appealed to the New York Court of Appeals. That case may afford that court an opportunity to discuss the existence of the public official rule in New York State which it has not discussed since the *Bennet* case.[19] If the instant case were restored to the docket for reargument this court would have before it the final outcome of the *Hall* case, which may be of aid even though that case has developed in terms of fair comment on an incontrovertible fact rather than as a case under the public official rule.

4. Respondent attacks the New York rule under which imputations as to state of mind, no matter how unpopular, are never libelous *per se*, in part by questioning the existence of the group libel rule of which it is a necessary concomitant. The *Kirkman* case[20] which he relies upon to this end, holds merely that legal entities known as unincorporated associations (in this instance a labor union) may sue for libel. It does not affect the underlying New York law that such indeterminate groups as "the Catholics," "the Anarchists," "the Jews," "the Wets," or "the Democrats" may not sue.[21] This group libel rule makes mandatory the correlative "state of mind" rule, recognized by Judge HOLMES in the case of "the Irish,"[22]

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[18] Judgment in the *Hall* case, involving a charge of Quislingism, having been entered on April 3, 1942, the appellant has sixty days in which to bring his appeal to the Court of Appeals. New York Civil Practice Act § 592. We are informed by counsel for the defendant that counsel for the plaintiff Congressman has publicly announced his intention to take an appeal.

[19] *Bennet* v. *Commercial Advertiser Assn.*, 230 N. Y. 125 (1920).

[20] *Kirkman* v. *Westchester Newspapers Inc.*, 287 N. Y. 373, decided January 22, 1942.

[21] For a recent expression of this rule by the N. Y. Ct. of Appeals, see *Gross* v. *Cantor*, 270 N. Y. 93, 96.

[22] *Fay* v. *Harrington*, 176 Mass. 270, our Main Brief, page 21.

a rule which is completely disregarded by the decision below. Respondent makes much of the fact that the charge here was of bigotry against the Jews and it is true that the instant case is of special importance to Jews, as indicated by the *amicus curiae* brief filed on behalf of various Jewish organizations.[28] But the decision below applies equally to a charge of political bigotry ("reactionary", etc.) economic bigotry (a "labor baiter," and "economic royalist", etc.) or any other attitude on a public question which might be equally if not more, injurious. The Court below does not attempt to limit the sweep of the doctrine which it laid down. As the dissenting judge pointed out, it "would take in comments found day after day in the most conservative papers, either in direct statement or as quotations of responsible critics, that a public official, particularly a legislator, is pro- or anti-labor, or pro- or anti-Nazi, or pro or anti this or that race, color or creed" (R. 32).

The Interpretation of the Alleged Libel

The broad sweep of the decision below is especially unfortunate because in point of fact the instant case does not involve a charge of general prejudice against Jews. No such prejudice can be deduced from opposition to the appointment of a single Jew to a particular office. This is fully discussed in our main brief, Point IV. The full text of the column in which the item originally appeared, which may be found in *Sweeney* v. *Caller Times Publ. Co.*, 41 F. Supp. 163 (D. Tex), contained the following additional matter directly preceding the last paragraph of the publication complained of herein, and

[28] The American Jewish Committee, the B'nai B'rith, the Jewish Labor Committee, and the American Jewish Congress.

serves further to point to the meaning which we contend is the only tenable one:

> "Justice department officials say he has made an excellent record as U. S. attorney, is able, progressive, and was second on the list of judicial candidates submitted by the executive committee of the Cleveland Bar Association. First on the list was Carl Friebolin, whom justice department officials say they would have gladly appointed despite his age of 60, had he not eliminated himself voluntarily for physical reasons.
>
> "Two others on the bar association's list, Walter Kinder and Harry Brainard, were eliminated because of *big business* or *reactionary* connections. Last on the list was Dan B. Cull, former Common Pleas Court judge, and an excellent appointment except that he happens to be a *Catholic* and the last two judicial appointments in Ohio have been Catholics. So the justice department returned to the No. 2 man on the list, a Jew." (Italics ours.)

The holding that the publication complained of evidences a general bigotry toward Jews flies in the face of the accepted practice of weighting appointments on the basis of race, religion, domicile, economic background and other like and even more subtle characteristics.

Policy and Constitutional Aspects of the Instant Tie Vote

The rule of thumb adopted by this Court in the case of tie votes is that the holding of the next lower court be permitted to stand. In the normal case this may be a workable enough rule, although its fortuitous character can be plainly seen in cases like the present where there has been an even division of justices all the way up. But the rule can be downright pernicious in cases where constitutional issues are involved. For the even division leaves

undecided the fundamental inquiry both as to whether a colorable constitutional claim has been asserted and whether it should be sustained. It is a well settled rule of this Court that that construction of a Congressional statute should be adopted which avoids all doubts as to its unconstitutionality.[24] We respectfully urge that in cases where one possible interpretation of state law raises a constitutional issue and the other does not, an equal division of the justices requires an adoption of the construction which avoids the possible constitutional infirmity.

We have discussed fully in our main brief the constitutional deprivations inherent in a sustaining of respondent's position (Point III). All doubts on this score can be avoided by a construction of New York law under which, as we contend, the publication is not libelous *per se* whatever its meaning, *i. e.*, whether it charges anti-semitism or not.

The case so far having been a complete draw, we ask this Court to let the factor of deep public policy[25] cast the deciding vote. Weighing the societal interest in freedom of speech against the individual interest in reputation, we submit that in a case of presumptive liability for words all doubts should be resolved against a rule which limits the freedom of speech and of the press described by this

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[24] See *Interstate Commerce Commission* v. *Oregon-Washington R. & Nav. Co.*, 288 U. S. 14, 40 (1932) ("Our duty is to construe the statute, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score."); also to the same effect *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932); *Lucas* v. *Alexander*, 279 U. S. 573, 577 (1929); *Richmond Screw Anchor Co.* v. *U. S.*, 275 U. S. 331, 342 (1928).

[25] See our Main Brief, pages 23-30.

Court as "the matrix, the indispensable condition of all other rights."[26]

Respectfully submitted,

MORRIS L. ERNST,
WILLIAM A. ROBERTS,
Solicitors for Petitioner.

Of Counsel:

BENJAMIN KAPLAN,
HARRIET F. PILPEL,
EDGAR TURLINGTON.

Also Of Counsel:

Attorneys for the Defendants in Other Cases Instituted by Respondent Involving Substantially the Same Subject Matter As the Instant Case:

	Attorney for
ALBERT M. CRAWFORD, Prescott, Arizona	Prescott Courier, Prescott, Arizona; Douglas Dispatch, Douglas, Arizona
RALPH W. BILBY, Tucson, Arizona	Tucson Daily Citizen, Tucson, Arizona
CLARENCE J. RUDDY, Aurora, Illinois	Joliet Herald-News, Joliet, Illinois
ROBERT L. BRACKEN, Dixon, Illinois	Dixon Evening Telegram, Dixon, Illinois
C. L. HUNT, Concordia, Kansas	Concordia Blade-Empire, Concordia, Kansas
J. B. MCKAY, El Dorado, Kansas	El Dorado Times, El Dorado, Kansas
RAY H. CALIHAN, Garden City, Kansas	Garden City Daily Telegram, Garden City, Kansas

[26] *Palko* v. *Connecticut*, 302 U. S. 319, 327.

	Attorney for
R. C. Russell Great Bend, Kansas	Great Bend Tribune Great Bend, Kansas
Fred M. Harris Ottawa, Kansas	Ottawa Herald Ottawa, Kansas Hutchinson News Hutchinson, Kansas Atchison Globe Atchison, Kansas Winfield Daily Courier Winfield, Kansas
Doran Kline Topeka, Kansas	Topeka State Journal Topeka, Kansas
Owen A. Hoban Gardner, Massachusetts	Gardner News Gardner, Massachusetts
Joseph T. Bartlett and Charles N. Stoddard, Jr. Greenfield, Massachusetts	Greenfield Recorder-Gazette Greenfield, Massachusetts
Arthur S. Houghton Worcester, Massachusetts	Worcester Telegram Worcester, Massachusetts
A. M. Curtis Springfield, Missouri	Springfield Newspapers, Inc. Springfield, Missouri
Frederic Twelvetrees Buffalo, New York	Buffalo Courier-Express Buffalo, New York
Wilson Price Jamestown, New York	Jamestown Post Jamestown, New York
C. O'Connor Goolrick Fredericksburg, Virginia	Fredericksburg Free Lance-Star Fredericksburg, Virginia
Richard H. Mann Petersburg, Virginia	Petersburg Progress-Index Petersburg, Virginia
A. Hamilton Bryan Richmond, Virginia	Richmond News-Leader Richmond, Virginia
H. L. Snyder Charleston, West Virginia	Charleston Gazette Charleston, West Virginia
T. H. Spence Milwaukee, Wisconsin	Milwaukee Sentinel Milwaukee, Wisconsin

I, MORRIS L. ERNST, solicitor for the above named petitioner, do hereby certify that the foregoing petition for a rehearing of this case and for stay of issuance of mandate is presented in good faith and not for delay.

MORRIS L. ERNST.

7 May, 1942.